

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Joint Petition for Rulemaking to Resolve)	RM-10865
Various Outstanding Issues Concerning the)	
Implementation of the Communications)	
Assistance for Law Enforcement Act)	

JOINT STATEMENT OF INDUSTRY AND PUBLIC INTEREST

SUBMITTED ON BEHALF OF

**8X8, INC., ACCESSLINE COMMUNICATIONS, INC.,
AMERICAN CIVIL LIBERTIES UNION, AMERICAN LIBRARY ASSOCIATION,
AMERICANS FOR TAX REFORM, ASSOCIATION OF RESEARCH LIBRARIES,
CENTER FOR DEMOCRACY & TECHNOLOGY, COMPTTEL/ASCENT, COMPUTER
AND COMMUNICATIONS INDUSTRY ASSOCIATION,
COMPUTING TECHNOLOGY INDUSTRY ASSOCIATION,
CONFERENCE AMERICA, COVAD COMMUNICATIONS COMPANY,
THE CRYPTORIGHTS FOUNDATION, EDUCAUSE,
ELECTRONIC FRONTIER FOUNDATION, FREE CONGRESS FOUNDATION,
INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA,
MCI, NATIONAL ASSOCIATION OF MANUFACTURERS, NET2PHONE, INC.,
NET2PHONE GLOBAL SERVICES, LLC, NET2PHONE CABLE TELEPHONY, LLC,
PRIVACILLA.ORG, THE RUTHERFORD INSTITUTE, SUN MICROSYSTEMS,
TELIC COMMUNICATIONS, AND THE VOICE ON THE NET (VON) COALITION**

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Dated: April 27, 2004

SUMMARY

The parties to this joint statement are a diverse group of Internet and telecommunications companies, trade associations, industry coalitions and public interest groups. Often we vigorously disagree with each other on a wide range of issues. However, we are all agreed that granting the petition to expand CALEA to information services and the Internet would be inappropriate for three reasons:

- It would be unlawful – the text of the CALEA statute precludes granting petitioners' demands to sweep in broadband Internet access and broadband applications.
- It would be unwise – granting those demands would drive up costs, impair and delay innovation, threaten privacy and force development of the latest Internet innovations off-shore.
- It would be unnecessary – law enforcement already has Internet surveillance abilities through other statutes and through the cooperation of service providers.

CALEA was a narrowly crafted statute, enacted to address law enforcement concerns that wiretaps of phone conversations would become more difficult with digital telephone networks. Congress required telecommunications common carriers – providers of traditional local wireline and wireless telephone service – to design and build into their telecommunications networks basic wiretap capabilities. At the same time, Congress made clear that it was not attempting to regulate information services and the Internet. Congress wanted to protect innovation and growth of these rapidly developing new technologies and services. Congress also narrowly focused the statute in order to protect individual privacy.

Many of the parties joining in this statement of common views have submitted detailed individual comments to the Commission, and many are submitting reply comments as well, dealing with the full range of issues raised in the petition. These comments focus on the

problems with the request to expand coverage of CALEA to information services, including broadband Internet access and broadband telephony services.

I. GRANTING THE PETITION WOULD BE UNLAWFUL

A. Congress Exempted Information Services from CALEA

Congress expressly excluded “information services” – shorthand in 1994 for the Internet – from CALEA obligations. Congress specifically stated that CALEA’s requirements to design and build into equipment wiretap capabilities do not apply to information services.¹ The statutory definition and legislative history are clear: the term “information services” was broadly defined to cover current and future advanced software and software-based electronic messaging services, including email, text, voice and video services.² Broadband access and broadband telephony services fit squarely within the definition of information services.³ Congress even explicitly specified that telecommunications common carriers are exempt from CALEA to the extent they are engaged in providing information services such as email or Internet access.⁴ Transmission and switching facilities are covered only to the extent they are used for telecommunications.

¹ 47 U.S.C. § 1002(b)(2).

² 47 U.S.C. § 1001(6)(A); *see also, e.g., Telecommunications Carrier Assistance to the Government*, H.R. Rep. 103-827(I), at 23 (Oct. 4, 1994) (“*House Report*”) (CALEA obligations “do not apply to information services, such as electronic mail services, or on-line services, . . . or Internet service providers”).

³ Because DSL is provided over transmission facilities that also provide telecommunications services, under the FCC’s prior rulings, the transport layer of DSL constitutes the one exception to the rule that broadband access is an information service. *In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, at ¶ 27 (1999). No new proceeding is needed to reconfirm that.

⁴ 47 U.S.C. § 1001(8)(C)(i).

B. Congress Limited CALEA to Common Carriers Providing Telecommunications Services

CALEA applies only to telecommunications common carriers. By focusing on telecommunications common carriers, Congress clearly intended to cover only companies operating under common carriage rules.⁵ Congress excluded Internet Service Providers and Application Service Providers, which were plainly not subject to FCC common carriage regulation. Neither “broadband access” nor “broadband telephony” services are telecommunication services provided by a telecommunications common carrier.⁶ The government argues that a telecommunications service includes not only circuit-mode switching but also packet-mode switching provided by servers and routers. Such an expansive interpretation would gut the information services exemption and sweep in all of the Internet. As hard as it tries, the government cannot force the diversity of services available over the Internet into a single format resembling traditional telephone networks.

C. Congress Permitted the Extension of CALEA Obligations Only to a Service Provider that Replaced a Substantial Portion of the Local Telephone Exchange Service

Although Congress permitted the extension of CALEA beyond common carriers, the extension is limited to those situations where the FCC determines that a particular entity is providing a service that is a replacement for a substantial portion of the local telephone exchange service, and that it is in the public interest to deem the service provider a telecommunications

⁵ 47 U.S.C. § 1001(8)(A) (defining “telecommunications carrier” as “a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire”); *House Report* at 18 (“[t]he only entities required to comply with the functional requirements [of CALEA] are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders”).

⁶ Again, the one exception is the transport layer of DSL.

carrier for CALEA purposes.⁷ However, petitioners failed to offer any evidence that a particular broadband service or VOIP provider in fact has replaced a substantial portion of any particular local telephone exchange services. Nor could they – the largest VOIP provider has only 130,000 customers worldwide, compared to 182 million local access lines in the United States. Indeed, the FCC has not yet found any service to be a replacement for the local exchange telephone network in any context – not even wireless service, where 3%-5% of users have substituted wireless service for their primary local exchange line.⁸

D. Congress Specified That CALEA Enforcement for Non-Compliance Would Be in the Courts and That Neither the Department of Justice nor the Commission Would Have Pre-Clearance Approval over Technology Innovation

There is no statutory basis for the establishment of a “pre-clearance” regime for future telecommunications services and capabilities to determine compliance with CALEA. To the contrary, the statute is clear that industry will lead in developing standards;⁹ individual companies may continue to innovate and deploy new technologies and services;¹⁰ and the Attorney General may bring a civil enforcement action for non-compliance.¹¹

II. GRANTING THE PETITION WOULD BE UNWISE

A. Granting the Petition Would Drive Up Costs for Businesses and Consumers

Congress was clearly sensitive to the potential burden on industry of developing and deploying intercept capabilities. CALEA states that the government must pay for the

⁷ 47 U.S.C. § 1001(8)(B)(ii).

⁸ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Triennial Review Order, 18 FCC Rcd 16978, at ¶ 445 (2003).

⁹ 47 U.S.C. § 1006(a).

¹⁰ 47 U.S.C. § 1002(b)(1)(B).

¹¹ 18 U.S.C. § 2522; 47 U.S.C. § 1007(a).

deployment of equipment, facilities and services if compliance is not reasonably achievable.¹²

The petitioners seek an advance determination that all telecommunications carriers are solely responsible for implementation costs. Such a determination would eliminate CALEA's provisions for the FCC granting case-by-case relief based on difficulty and expense for the carrier and its users.¹³

B. Granting The Petition Would Impair Innovation and Drive Internet Development Off-Shore

Congress – and the FCC – have a long and respected history of allowing the Internet, and the technologies on which the Internet is built, to develop and grow without significant interference or constraint. Granting the petition would create substantial uncertainty and produce a chilling effect on the development of new technologies and services. A regulatory “pre-approval” process would delay and potentially prohibit the deployment of new technologies. It also would impose the cost of building wiretap capabilities into new technologies even before it is clear they will succeed in the market. Higher cost and greater delay lead to less innovation.

The United States does not have and has never had a monopoly on the development of innovative information technologies. Internet traffic travels anywhere in the world and facilities that act on information can be (and are) located anywhere. Granting the petitioners' request will reduce the ability of providers in the United States to compete with foreign providers not subject to the same regulations. Foreign companies would be handed a financial and speed-to-market advantage. Providers in the United States would be required to delay deployment of their services until they are able to develop, deploy and obtain pre-clearance of CALEA capabilities, and to increase the charges for their services in order to recover the cost of such capabilities.

¹² 47 U.S.C. § 1008(b)(2).

¹³ 47 U.S.C. § 1008(b)(1).

C. Granting the Petition Would Threaten Privacy and Security

In CALEA, Congress sought to protect privacy, which Congress recognized as a fundamental value. One of the ways it did so was to narrowly focus the scope of the design mandate. Building surveillance capabilities into broadband access and Internet applications could adversely affect privacy and open the potential for privacy abuses. It could also have grave negative effect on Internet security at a time when Internet security and critical infrastructure protection are major national concerns.

III. GRANTING THE PETITION IS UNNECESSARY

A. Petitioners Have Provided No Evidence That There Is a Real Problem

Law enforcement makes tens of thousands of requests each year for business records and other information regarding information services (online accounts and e-mail communications). Information service providers comply with these requirements. Title III wiretap orders that are received also are complied with. The petitioners have offered no specific technical situations in which they are unable to intercept a VOIP communication. Even if the FCC had the authority to grant the petition (which it does not), it certainly should not do so without a detailed demonstration of compelling need.

B. The Internet and Information Services Are Already Subject to Surveillance

Providers of information services must already comply with lawful wiretap requests and other evidence gathering pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and the Electronic Communications Privacy Act of 1986. In short, law enforcement can “wiretap the Internet” today, using existing commercially driven technologies to satisfy the government’s requests.

C. Industry Has Developed Intercept Solutions Even for Technologies Not Covered By CALEA

While those who provide information services are not required to “build in” specific surveillance capabilities, providers of information services and equipment have committed substantial resources and worked with law enforcement agencies to develop new technical capabilities and procedures to facilitate surveillance of advanced technologies. Providers of cable telephony have adopted a series of standards for providing intercept capabilities. Equipment makers also have added intercept features to their broadband telephony products used by both non-cable and cable broadband providers. It is not necessary to give the FBI the power to design and dictate every detail of an intercept solution before it is adopted and to demand changes no matter what they cost industry and consumers. The FBI and other agencies will have to bear some of the cost of keeping up with the times and take advantage of the capabilities that industry has developed.

CONCLUSION

For the foregoing reasons, the undersigned diverse group of Internet and telecommunications companies, trade associations, industry coalitions and public interest groups agree that granting the petition to expand CALEA to information services and the Internet would be inappropriate.

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Dated: April 27, 2004